

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Docket No. 135787

Plaintiff-Appellee

vs

LINCOLN WATKINS,

Defendant-Appellant

-----/
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STATEMENT OF JURISDICTION

Jurisdiction is granted by Article VI, Section 1 of the Michigan Constitution of 1963, and is recognized in MCR 7.301(A)(2). In an Order dated April 23, 2008, the Supreme Court granted leave to appeal the December 13, 2007 judgment of the Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

I.

DOES MCL 768.27A CONFLICT WITH MRE
404(b)?

The Court Of Appeals Says, "YES"

Defendant-Appellant Says, "YES"

Plaintiff-Appellee Says, "YES"

II.

DOES THE STATUTE PREVAIL OVER THE
COURT RULE?

The Court of Appeals Says, "YES"

Defendant-Appellant Says, "NO"

Plaintiff-Appellee Says, "YES"

III.

WHETHER THE OMISSION OF ANY
REFERENCE TO MRE 403 IN MCL 768.27a,
WHILE MANDATING THAT PROPENSITY
EVIDENCE "IS ADMISSIBLE FOR ANY
PURPOSE FOR WHICH IT IS RELEVANT,"
VIOLATED DEFENDANT'S DUE PROCESS
RIGHT TO A FAIR TRIAL?

The Court of Appeals Did Not Address The Issue.

Defendant-Appellant Asserts That MRE 403
Balancing Is Required, Notwithstanding The
Omission Of Any Reference.

Plaintiff-Appellee Has Not Yet Addressed The Issue

IV.

SHOULD THE COURT RULE THAT
PROPENSITY EVIDENCE DESCRIBED IN MCL
768.27a IS ADMISSIBLE ONLY IF IT IS
NOT OTHERWISE EXCLUDED UNDER MRE
403?

The Court Of Appeals Did Not Address The Issue.

Defendant-Appellant Says, "NO"

Plaintiff-Appellee Has Not Yet Addressed The Issue.

V.

DOES MCL 768.27a INTERFERE WITH THE
JUDICIAL POWER TO ENSURE THAT A
CRIMINAL DEFENDANT RECEIVES A FAIR
TRIAL?

The Court Of Appeals Did Not Address The Issue.

Defendant-Appellant Says, "YES"

Plaintiff-Appellee Has Not Yet Addressed The Issue.

STATEMENT OF FACTS

Defendant-Appellant Lincoln Watkins (hereinafter, "Defendant"), was charged in an Information filed in the Wayne County Circuit Court with five counts of Criminal Sexual Conduct, First Degree and one count of Criminal Sexual Conduct, Second Degree. That Information alleged that on May 29, 2006, Defendant engaged in five instances of sexual intercourse and one instance of sexual contact with Tifny McClore, a person then under the age of 13 years.

Prior to Defendant's first trial, which resulted in a hung jury, the trial court granted a prosecution request to admit evidence of Defendant's prior "bad acts" regarding Ekemini Williams, the first cousin of Defendant's wife. However, before the second trial began, the court granted defense counsel's motion for reconsideration, and excluded the "bad acts" evidence regarding Ms. Williams. The trial court held that such evidence would not be admissible under either MRE 404(b) or MCL 768.27a.

The prosecution then sought interlocutory relief by filing an application for leave to appeal in the Court of Appeals. This matter was docketed as COA Case No. 277905. On May 14, 2007, the Court of Appeals entered an Order to the effect that the testimony of Ekemini Williams would be admissible under MCL 768.27a, to the extent that it is evidence that the defendant committed a "listed offense", as defined in MCL 28.722, against her while she was a

minor.

Defendant then sought review of this Order by filing an emergency application for leave to appeal in the Michigan Supreme Court. That matter was docketed as SC No. 134369. On July 20, 2007, the Supreme Court entered an Order which vacated the May 14, 2007 Order, and remanded the case to the Court of Appeals for plenary consideration of whether MCL 768.27a conflicts with MRE 404(b), and, if it does, whether the statute prevails over the court rule. The Order was silent as to whether the Supreme Court was retaining jurisdiction.

The Court of Appeals then advised the parties that the matter would proceed under the same previously assigned docket number. The Court indicated that it had simply reopened its file, and that all parties would retain the same designations that they had during the prior appeal.

The parties then submitted written briefs on the issue identified in the July 20, 2007 Supreme Court Order, and appeared before the Court of Appeals for oral argument on December 5, 2007.

On December 13, 2007, the Court of Appeals entered its Opinion regarding this case. The Court therein held that the conflict present in this case centers on the Legislature's substantive policy decision that in such cases juries should have the opportunity to weigh a defendant's behavioral history and view the cases' facts in the larger context that the defendant's background

affords. Therefore, because MCL 768.27a is a substantive rule of evidence deeply rooted in weighty policy considerations, it controls over MRE 404(b).

Defendant sought leave to appeal this decision, asserting that this issue involves legal principles of major significance to the state's jurisprudence. In an Order dated April 23, 2008, the Supreme Court granted leave. The Court instructed the parties to include among the issues to be briefed: (1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule, see *McDougall v Schanz*, 461 Mich 15 (1999), and Const 1963, art 6, § 1 and §5; (3) whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that propensity evidence "is admissible for any purpose for which it is relevant," violated defendant's due process right to a fair trial; (4) whether the Court should rule that propensity evidence described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403; and (5) whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial, a power exclusively vested in the courts of this state under Const 1963, art 6, §1.

ARGUMENT

MCL 768.27a VIOLATES THE FUNDAMENTAL RIGHT OF "PRESUMPTION OF INNOCENCE" AND UNCONSTITUTIONALLY INFRINGES ON THE SUPREME COURT'S AUTHORITY.

Standard Of Review:

The constitutionality of a statute enacted by the Michigan Legislature presents a question of law which is reviewed de novo. Cardinal Mooney High School v Michigan High School Athletic Ass'n, 437 Mich 75, 80 (1991).

Argument:

Defendant-Appellant here asserts a constitutional challenge to the validity of a state statute which provides on its face that certain "bad acts" evidence is admissible for any purpose, including a defendant's propensity to commit such a crime. In granting leave to appeal a Court of Appeals decision which upholds the statute, this Honorable Court instructed the parties to address: (1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule; (3) whether the omission of any reference to MRE 403 in MCL 768.27a, while mandating that propensity evidence "is admissible for any purpose for which it is relevant," violated defendant's due process right to a fair trial; (4) whether the Court should rule that propensity evidence described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403; and (5) whether MCL

768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial. Thus Defendant-Appellant here organizes his argument in a manner to directly address each of the questions posed by the Court.

**1. MCL 768.27a AND MRE
404(b) ARE IRRECONCILABLY
IN CONFLICT.**

Article VI, Section 5 of the Michigan Constitution of 1963 provides that the supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. This constitutional authority empowers the courts to make their own rules of procedure, including rules of evidence. Perin v Peuler (On Remand), 373 Mich 531 (1964).

Pursuant to this constitutional authority, the Michigan Supreme Court has promulgated MRE 404(b)(1). This rule of evidence provides:

(B) Other crimes, wrongs or acts

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith. It may, however, be admissible for other purposes, such a proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
(Emphasis Added)

There can be no question but that the portion of the rule of evidence prohibiting character evidence for demonstrating a

propensity to commit a crime was designed as a procedural protection to ensure a fundamental right. As discussed in People v Crawford, 458 Mich 376 (1998):

The character evidence prohibition is deeply rooted in our jurisprudence. Far from being a mere technicality, the rule "reflects and gives meaning to the central precept of our system of criminal Justice, the presumption of innocence." United States v Daniels, 248 US App DC 198, 205; 770, F2d 1111 (1985). Underlying the rule is the fear that a jury will convict the defendant inferentially on the basis of his bad character rather than because he is guilty beyond a reasonable doubt of the crime charged. Evidence of extrinsic bad acts thus carries the risk of prejudice, for it is antithetical to the precept that "a defendant starts his life afresh when he stands before a jury...." People v Zackowitz, 254 NY 192, 197; 172 NE 466 (1930). As the United States Supreme Court recently noted in Old Chief v United States, 519 US 172; 115 S Ct 644; 136 L Ed 2d 574 (1997), the problem with character evidence generally and prior bad acts evidence in particular is not that it is irrelevant, but, to the contrary, that using bad acts evidence can "weigh too much with the jury and ... so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Quoting Michelson v United States, 335 US 469, 476; 69 S Ct 213; 93 L Ed 168 (1948). The fundamental principle of exclusion, codified by MRE 404(b), is woven into the fabric of Michigan jurisprudence:

There can be little doubt that an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity. Nevertheless, in our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant's prior acts in reaching its verdict. See United States v Mitchell, 2 US (2 Dall) 348, 357; 1 L Ed 410 (1795). [People v Allen, 429 Mich 558, 566-567; 420 NW2d 499 (1988).]

Notwithstanding the basic prohibition on the use of "bad acts"

evidence to show a defendant's propensity to committed a charged crime found in the rule of evidence, which was clearly intended as a procedural protection of the fundamental precept of the "presumption of innocence," the Michigan Legislature enacted MCL 768.27a. That statute provides, in pertinent part:

Sec. 27a (1) Notwithstanding section 27¹, in a criminal case in which the defendant is accused of committing a listed offense² against a minor, evidence that the defendant committed another listed offense against a minor is admissible and **may be considered for its bearing on any matter to which it is relevant....**(Emphasis Added)

The conflict between MRE 404(b)(1) and MCL 768.27a(1) is apparent and substantial. The rule of evidence expressly prohibits "bad acts" evidence to prove the character of a person in order to show action in conformity with such character. On the other hand, MCL 768.27a(1) expressly permits certain "bad acts" evidence to be used for any purpose, including the defendant's propensity to commit the charged offense. The rule of evidence and the statute cannot be rationalized. One must simply give way to the other.

¹ MCL 768.27. That statutory provision authorizes the admission of "bad acts" evidence to show motive, intent, the absence of mistake or accident, or scheme, plan or system of doing an act. Except for the sentence within MRE 404(b)(1) providing that other crimes, wrongs or acts are not admissible to prove the character of a person in order to show action in conformity therewith, this statutory provision is similar in language and intent with the rule of evidence.

² The term "listed offense" is defined in MCL 768.27a(2)(a). Under that statutory provision, "listed offense" means that term as defined in section 2 of the Sex Offenders Registration Act, MCL 28.722.

2. MCL 768.27a CANNOT PREVAIL OVER THE COURT RULE BECAUSE THIS STATUTE UNCONSTITUTIONALLY INFRINGES ON THE SUPREME COURT'S AUTHORITY TO REGULATE PRACTICE AND PROCEDURE IN ALL COURTS OF THIS STATE.

The general rule is that when there is a conflict between a statute and a court-promulgated rule of evidence, the court-promulgated rule prevails if it governs practice and procedure. People v Strong, 213 Mich App 107 (1995), Perin, supra. But this general rule leaves open the question as to whether the conflict between the statute and the court promulgated rule of evidence actually involves a matter of "practice and procedure" or one of "substantive law."

In McDougall v Schanz, 461 Mich 15 (1999), this Honorable Court directly addressed the distinction between procedural rules of evidence and evidentiary rules of substantive law. In doing so, it developed a rule concerning the validity of statutory rules of evidence:

We conclude that a statutory rule of evidence violates Const 1963, art 6, § 5 only when "no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified....Kirby v Larson, 400 Mich 585, 598; 256 NW2d 400 (1977) (opinion of Williams, J.), citing 3 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 404; see also Joiner & Miller, Rules of practice and procedure: A study of judicial rule making, 55 Mich L R 623, 650-651 (1957). Therefore, "[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration ... the [court] rule should yield." Joiner & Miller,

supra at 635. We agree with Professor Joiner that [m]ost rules of evidence have been made by courts. Now and then the legislature has, as a result of policy consideration over and beyond matters involving the orderly dispatch of judicial business, enacted rules of evidence. The distinction previously pointed out between policy considerations involving the orderly dispatch of judicial business on the one hand and policy considerations involving something more than that on the other hand is the distinction that must be carried through into the evidence field. [id. At 650-651.]

We conclude that this common-sense approach properly gives effect to the constitutionally required distinction between "practice and procedure" and substantive law.... (Footnotes Omitted)

In McDougall, supra, this Court further recognized that the distinction between a procedural and a substantive matter is often difficult and is best decided on a case by case basis:

We appreciate the difficulty that attends the drawing of the line between "practice and procedure" and substantive law. That the task is difficult and one that must be made on a case-by-case basis is no legitimate challenge to our constitutional duty to draw that line in a fashion that respects this Court's constitutional authority as well as that of the Legislature. The rule we adopt today recognizes the difficulty inherent in this line-drawing task - one that the drafters of the 1963 Constitution themselves acknowledged.

Applying this rule, the McDougall Court concluded that a statute which provides strict requirements for the admission of expert testimony in medical malpractice cases brought against specialists prevailed over a conflicting rule of evidence. While MRE 702 authorizes expert testimony on the basis of knowledge, skill, experience, training or education, the statute operates to preclude certain witnesses from testifying solely on the basis of

the witness' lack of practice or teaching experience in the relevant specialty. The Court noted that the statute was a result of the Legislature's dissatisfaction with the manner in which some courts were exercising their discretion regarding expert testimony. Because it reflected wide-ranging and substantial policy considerations relating to medical malpractice actions against specialists, properly within the scope of legislative power, the statutory rule of evidence really addressed an issue of "substantive law," rather than "practice and procedure."

The Court of Appeals similarly considered the substantive/procedural test in resolving the dispute presented in People v Conat, 238 Mich App 134 (1999). MCR 6.931 is a court rule providing that when a juvenile is convicted in the circuit court, a hearing is required to determine whether to sentence the offender as an adult or as a juvenile. To the contrary, MCL 769.1(1) required the circuit court to sentence juveniles convicted of certain offenses as adults. Here the court held that the statute prevailed because it was an enactment of substantive law. The court noted that the statute involved substantive policy considerations regarding juvenile crime and how to punish juveniles who commit serious crimes. The legislative intent behind the automatic waiver system was to require more severe punishment for juveniles who commit serious crimes. The Court thus determined that such a substantive policy choice by the Legislature does not infringe on

the Supreme Court's procedural rulemaking authority.

But even under the McDougall rule, a statutory rule of evidence does not prevail over a court promulgated rule of evidence simply because policy considerations are involved. The McDougall court expressly rejected such a bright-line rule in favor of a case-by-case determination. The protection of fundamental rights is a prime responsibility of the judiciary. The orderly dispatch of judicial business necessarily includes making policy considerations.

Recognizing the obvious conflict between the MRE 404(b) and MCL 768.27a, the Court of Appeals here held that a determination as to which would prevail must be made on a case-by-case basis, giving the Legislature preeminence over substantive issues. The Court of Appeals determined that the conflict here centers on the Legislature's substantive policy decision that in such cases juries should have the opportunity to weigh a defendant's behavioral history and view the case's facts in the larger context that the defendant's background affords. Relying on McDougall v Schanz, supra, the Court of Appeals held that because MCL 768.27a is a substantive rule of evidence deeply rooted weighty policy considerations, it prevails over MRE 404(b).

What the Court of Appeals fails to recognize or address is that MRE 404(b) must be viewed as a procedural safeguard intended to protect a fundamental right. The qualifications necessary to

testify as an expert witness, and the question as to whether a court must conduct a hearing before deciding whether to sentence a juvenile as an adult, present far different policy considerations than the protection of the fundamental precept of the presumption of innocence.

The principle of the presumption of innocence is an essential foundation of our adversarial system of criminal justice. In re Winship, 397 US 358 (1970). It is "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v United States, 156 US 432, at 453 (1895).

When promulgated to protect such a fundamental right, a rule of evidence is within the orderly dispatch of judicial business, and a legislative attack on such a rule should be viewed as an attack on the fair administration of justice. Here the legislative "policy" is to deny a person previously convicted of a sexual offense involving a child the fundamental right of the presumption of innocence. Such an attempt at intrusion on the orderly dispatch of judicial business cannot be considered a matter of "substantive law" under McDougal. Rather, it is an impermissible intrusion on this Court's power to regulate the "practice and procedure" in the courts of this state.

Such an argument is supported by the holding and rationale of the United States Supreme Court in Dickerson v United States, 530

US 428 (2000). There the Court implicitly recognized that a judicial rule imposed to protect a fundamental right is a matter of "practice and procedure" which takes precedence over a legislative attempt to limit such a right.

In the wake of Miranda v Arizona, 384 US 436 (1966), in which the Court held that certain warnings must be given before a suspect's statement made during a custodial interrogation could be admitted into evidence, Congress enacted 18 USC §3501, which in essence makes the admissibility of such statements turn solely on whether they were made voluntarily. Petitioner, under indictment for bank robbery and other related federal crimes, moved to suppress a statement he had made to the FBI on the ground that he had not been given the Miranda warnings before being interrogated. The District Court granted the motion, and suppressed the statement.

On appeal, the Fourth Circuit acknowledged that petitioner had not received Miranda warnings, but reversed the District Court on the basis that the statement was voluntary, and thus satisfied 18 USC §3501. The Circuit Court concluded that Miranda was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the admissibility question.

The Supreme Court reversed the Fourth Circuit, noting that since Miranda was a constitutionally based decision of that Court, it may not be in effect overruled by an Act of Congress. It noted

that the Supreme Court has supervisory authority over the federal courts to prescribe binding rules of evidence and procedure. It recognized that while Congress has ultimate authority to modify or set aside any such rules that are not constitutionally required, it may not supersede Court decisions interpreting or applying constitutional standards.

Following the logic and rationale of Dickerson, a legislative body similarly lacks the authority to modify or set aside a rule of evidence which protects so fundamental a right as the presumption of innocence. The protection of this fundamental right falls within the legitimate scope of judicial authority, and thus is a matter of "practice or procedure" upon which the Legislature may not intrude.

**3. NOTWITHSTANDING ITS LANGUAGE, MCL
768.27a WOULD STILL BE SUBJECT TO
THE BALANCING TEST OF MRE 403.**

Assuming *arguendo* that the statute does not violate "separation of powers" principles, it would still be subject to the balancing test of MRE 403. This is true, no matter what the legislative intent. "Due process" prohibits the blanket admission of propensity evidence without regard to the circumstances. MCL 768.27a simply cannot be viewed as a blank check entitling the government to introduce whatever evidence it wishes, no matter how minimally relevant and potentially devastating to the defendant. See United States v Lemay, 260 F.3rd 1018 (9th Cir. 2001).

There is a legitimate argument that the actual language of this statute, viewed in the context of the companion statute regarding the admissibility of "bad acts" evidence in domestic violence cases, intends to preclude the balancing test required by MRE 403³ when assessing the admissibility of evidence of another listed offense against a minor. MCL 768.27b(1), the statutory provision dealing with the admissibility of "bad acts" evidence in domestic violence cases, expressly provides that other acts of domestic violence are admissible for any purpose for which they are relevant only if they are not excluded under MRE 403. MCL 768.27a has no such limiting clause, and does not expressly acknowledge that it is subject to MRE 403.

Notwithstanding the lack of any specific language making it subject to MRE 403, constitutional "due process" considerations require that a court consider that court rule before admitting any evidence pursuant to MCL 768.27a. This is established by a line of federal cases which addressed a corresponding federal court rule.

Prior to 1994, propensity evidence was generally precluded in the federal courts by FRE 404(b), which provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

³ MRE 403 provides for the exclusion of relevant evidence on grounds of prejudice, confusion or waste of time. Its actual language is set out in the Appendix.

therewith. In 1994, Congress, exercising its rule-making authority, enacted FRE 413, 414 and 415 to establish special rules concerning sexual assault and child molestation cases. FRE 414, which deals with evidence of similar crimes in child molestation cases, provides, in pertinent part:

RULE 414. EVIDENCE OF SIMILAR CRIMES IN CHILD MOLESTATION CASES

- (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
- (b) ...
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- (d) ...

During the period before this federal court rule was enacted, and while its adoption was being debated, there was concern among the legal community that the language of section (c) might be construed in a manner so as to take FRE 414 out of the scope of FRE 403. Under FRE 403, a federal court expressly has the power to exclude even relevant evidence on grounds of prejudice, confusion or waste of time. These concerns over the adoption of FRE 414 were reviewed and discussed in United States v Larson, 112 F.3d 600 (2nd Cir, 1997):

Rule 414, which was enacted by Congress in 1994 as part of the Violent Crime Control and Law Enforcement Act, Pub.L. No 103-322, § 320935, 108 Stat.1796, 2135-37, and became effective on July 9, 1995, provides in pertinent part that [i]n a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant...

...

The extent to which the court may exclude proper Rule 414 evidence as a result of a Rule 403 balancing analysis has not previously been addressed by this Court. The sponsors of the legislative amendment that introduced Rule 414 noted that, in contrast to Rule 404(b), Rule 414 permits evidence of other instances of child molestation as proof of, *inter alia*, a "propensity" of the defendant to commit child molestation offenses but that

[i]n other respects, the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under evidence rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect. 140 Cong. Rec. S12990 (daily ed. Sept. 20, 1994)(Statement of Sen. Dole); 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994) (Statement of Rep. Molinari). With respect to the Rule 403 balancing, however, the sponsors stated that "[t]he presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice." 140 Cong. Rec. At S12990 (Statement of Sen. Dole); 140 Cong. Rec. At H8992 (Statement of Rep. Molinari (its probative value is "normally" not outweighed)).

The Judicial Conference of the United States opposed enactment of Rule 414 on the grounds, *inter alia*, that, as it reads, the Rule could be interpreted as requiring the automatic admission of uncharged acts of sexual misconduct without consideration of such concerns as a defendant's Sixth Amendment right of confrontation, and without any Rule 403 balancing to exclude evidence that is both unreliable and highly prejudicial. See Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, transmitted

to Congress on Feb. 9, 1995, 159 F.R.D. 51, 53 (1995); see also 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5416, at 297-300 (Supp. 1996).

Being fully aware of the expressed concerns, the Larson court held that the language of FRE 414 did not mandate the admission of propensity evidence, nor eliminate the need for a court to conduct the analysis required under FRE 403. Other federal appellate courts similarly ruled that evidence offered under FRE 414 is still subject to the requirements of FRE 403, and that evidence otherwise admissible under FRE 414 may be excluded under a Rule 403 balancing test. United States v Sumner, 119 F.3d 658 (8th Cir. 1997), United States v Meacham, 115 F.3d 1488 (10th Cir. 1997), United States v LeCompte, 131 F.2d 767 (8th Cir. 1997), United States v Mound, 149 F.3d 799 (8th Cir. 1998).

In Lemay, supra, the court took the matter one step further, holding that the analysis required under FRE 403 is constitutionally mandated. There the defendant asserted that FRE 414 violates due process principles by removing the longstanding ban on propensity evidence in criminal trials. He argued that the traditional rule precluding the use of a defendant's prior bad acts to prove his disposition to commit the type of crime charged is so ingrained in our jurisprudence as to be embodied in the due process clause of the Constitution.

The court concluded that there was nothing fundamentally unfair about the allowance of propensity evidence under Rule 414. The court noted that as long as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded. The court expressly held:

We therefore conclude that as long as the protections of Rule 404 remain in place so that district judges retain the authority to exclude potentially devastating evidence, Rule 414 is constitutional.

While subsequent cases have relied more on the "Congressional intent" that FRE 414 be subject to the balancing requirement of FRE 403, than on the constitutional mandate for such balancing recognized in Lemay, no court has expressly rejected its conclusion. United States v Stout, 509 F.3d 795 (6th Cir. 2007), United States v Horn, ____ F.3d ____ (No. 07-2085, 8th Cir. 4/25/2008).

Following the principle of Lemay, even if MCL 768.27a were to be held valid, it would still be subject to the "due process" requirement that the protections of MRE 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury. Without such protection, there is a real and substantial danger that a defendant will be denied a fair trial.

**4. BECAUSE A "FUNDAMENTAL RIGHT" IS
HERE INVOLVED, THIS HONORABLE COURT
SHOULD NOT SIMPLY RULE THAT MCL
768.27A IS VALID IF BALANCED AGAINST
MRE 403.**

Defendant-Appellant takes the position that this Honorable Court should not simply rule that propensity evidence described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403. In taking this position, he asserts that even when the balancing test of MRE 403 is employed, the statute violates his constitutional rights to "due process."

Defendant-Appellant has previously cited Lemay, supra, to support his argument that "due process" minimally requires a valid evidentiary statute to be balanced against MRE 403. However, this is not the same as saying that such an evidentiary statute is valid simply because such a balancing is required. Since the fundamental right of the "presumption of innocence" is here involved, MCL 768.27a violates "due process" even when propensity evidence is admissible only if it is not otherwise excluded by MRE 403. The rationale and analysis used in Lemay support such a position.

As previously discussed, Lemay involved the argument that FRE 414 violated "due process" by removing the long standing ban on propensity evidence in criminal trials. In analyzing this claim, the court summarized the applicable law:

The Constitution does not encompass all traditional legal rules and customs, no matter how longstanding and

widespread such practices may be. The Supreme Court has cautioned against the wholesale importation of common law and evidentiary rules into the Due Process Clause of the Constitution. In *Dowling v United States*, for example, the Court held that a rule or practice must be a matter of "fundamental fairness" before it may be said to be of constitutional magnitude. 494 U.S. 342, 350 (1990). The Court stated:

[B]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly....Judges are not free, in defining due process, to impose on law enforcement officials their personal and private notions of fairness and to disregard the limits that bind judges in their judicial function. They are to determine only whether the action complained of violates those fundamental concepts of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency.

Applying this standard of law, the court found that the defendant failed to show that the traditional ban on propensity evidence involves a "fundamental conception of justice." Therefore, it found that as long as the propensity evidenced was analyzed under MRE 403, minimal constitutional requirements were met.

Defendant-Appellant relies on a much different basis for his constitutional claim. Rather than attacking a statute permitting propensity evidence on the basis that it violates an "historic ban," he asserts that it violates his fundamental constitutional right to the "presumption of innocence." It is well settled that the presumption of innocence involves a "fundamental conception of justice." *In re Winship*, *supra*, *Coffin v United States*, *supra*. And this Honorable Court has clearly and unequivocally recognized that

the ban on propensity evidence is meant to protect this fundamental presumption of innocence. Crawford, supra. Applying the constitutional law stated and discussed in Lemay, the logical conclusion is that MCL 768.27a violates constitutional "due process" standards because it unduly infringes on the fundamental right to be presumed innocent.

5. THE RULE OF McDOUGALL V SCHANZ IS NOT APPLICABLE WHEN THE STATUTORY RULE OF EVIDENCE INTRUDES ON THE EXCLUSIVE JUDICIAL AUTHORITY TO ENSURE A CRIMINAL DEFENDANT A FAIR TRIAL.

Even though the application of McDougall v Schanz here requires that MRE 404(b) prevail over MCL 768.27a, the fact that the court rule was promulgated to protect a fundamental constitutional right negates the use of that standard. While McDougall v Schanz provides the general rule regarding conflicts between statutory rules of evidence and the court promulgated rules, this Honorable Court should recognize an exception when the statutory rule intrudes on this Court's exclusive constitutional judicial authority to ensure a defendant receives a fair trial.

Article VI, Section 1 of the Michigan Constitution 1963 provides:

Sec. 1. The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited

jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Under this constitutional mandate, the judicial power rests exclusively with the courts, and cannot be usurped by the legislature. The legislature cannot confer judicial power on any officer not specified in the constitution. People v Cummings, 88 Mich 249 (1891). In criminal prosecutions in which the people in their sovereign capacity prosecute for a crime against the laws of the whole society and seek to subject the defendant to punishment, it is the duty of the courts, not the legislature, to see that the constitutional rights of a defendant are not violated. Hill v People, 16 Mich 351 (1868).

Pursuant to this constitutional authority, this Honorable Court has promulgated MRE 404(b) for the express purpose of protecting a criminal defendant's fundamental right to the presumption of innocence. Crawford, supra. Since this action was taken under the Court's exclusive judicial power to ensure that a defendant will receive a fair trial, any legislative attempt to modify this rule would intrude on the Court's constitutional powers, whether the McDougall v Schanz standard is met or not.

This Court's exclusive constitutional authority to ensure that criminal defendants receive fair trials thus require an exception to the rule announced in McDougall v Schanz.

CONCLUSION AND RELIEF REQUESTED

For the reasons herein stated and discussed, this Honorable Court should reverse the Court of Appeals Decision entered on December 13, 2007, and hold that MRE 404(b) prevails over MCL 768.27a for each and every one of the reasons argued herein, and remand the case to the trial court for further proceedings consistent with these rulings.

Dated: July 15, 2008

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